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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation, MM Docket No. 93-25

Dear Ms. Salas:

PRIMESTAR Partners L.P. ("PRIMESTAR"), by counsel and pursuant to Section 1.1206 of the Commission's Rules, hereby submits, in duplicate, the following analysis of the meaning of certain provisions of the Communications Act of 1934, as amended (the "Act"), that are implicated in the above-referenced proceeding. Specifically, this analysis will address the definition of the terms "editorial control" and "direct costs" as used in Section 335(b) of the Act. Section 335(b) requires direct broadcast satellite ("DBS") operators to devote a certain percentage of their channel capacity to the carriage of non-commercial, educational and informational programming provided by qualified national educational program suppliers. In addition, we will address the implementation of the "lowest unit charge" provisions of Section 315 for DBS services, as required by Section 335(a) of the Act.

1. Editorial Control.

Section 335(b)(3) states that a provider of DBS service "shall not exercise any editorial control" over any video programming provided pursuant to this section. Several parties have argued that this language requires the Commission to adopt rules for DBS operators that mirror the "leased access" model applicable to cable television operators. Pursuant to Section 612 of the Act, the Commission has established rules that require cable operators to make certain channels available to third party programmers on a strict first-come first-serve basis. Except for certain limited categories (e.g. obscenity), cable operators are forbidden from having any role in selecting or refusing programs or programmers for inclusion on such channels.

A comparison of Sections 335(b) and 612, and their legislative histories, reveals that Congress did not intend to employ a Section 612-like leased access structure to DBS operators. Although Section 335(b) does not permit DBS operators to exercise editorial control over particular programming carried on the reserved channels, it is evident that DBS operators have the right, and must be permitted, to exercise some

discretion in selecting the programmers that will produce the programs for the channels.

The explicit purpose of the cable leased-access statute (Section 612) is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public." § 612(a), 47 U.S.C. § 532(a). In furtherance of this objective, Section 612 states that "[a] cable operator shall not exercise any editorial control over any video programming pursuant to this section, or *in any other way consider the content of such programming* . . ." 47 U.S.C. § 532(c)(2) (emphasis added).

As a corollary to Section 612, and in recognition of the fact that cable operators could make no decisions regarding the programming or the programmers on leased-access channels, Congress included in the Act a provision that insulates cable operators from state and federal defamation and similar laws arising out of the programming on leased access channels. 47 U.S.C. § 558.

When Section 612 is compared with Section 335(b), it is obvious that the DBS operators' obligations under Section 335(b) have a completely different purpose, and are embodied in completely different legislative language and history than the cable operators' obligations under Section 612. Accordingly, Section 335(b) does not require adoption of leased access rules for DBS operators.

First, the purpose of Section 335(b) is not "to assure the widest possible diversity of information sources" but "to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming." Conf. Rep. No. 102-862, 102d Cong., 2nd Sess. at 100 (1992). In addition, the language of Section 335(b) varies from the language of Section 612 in several important respects. Section 335(b) directs that the reserved DBS channel capacity be used for "noncommercial programming of an educational or informational nature." Moreover, the reserved DBS channels are to be made available to "national educational programming suppliers." Thus, by its terms, Section 335(b) requires a DBS operator to make certain decisions regarding the content of the programming (is it of an educational or informational nature?) and the programmers (are they national educational programming suppliers?).

Section 335(b) does not contain the more specific restriction on the exercise of editorial control set forth in Section 612. Although both sections of the Act provide that the relevant operator "shall not exercise any editorial control over any video programming provided," only Section 612, applicable to cable operators, contains the provision "or in any other way consider the content of such programming."

There is absolutely no indication in the legislative history of Section 335(b) that Congress intended for the more stringent definition of editorial control in Section 612 to apply to Section 335(b) or that DBS operators otherwise would be confined to the leased access model applicable to cable operators.

As a further indication of the distinctions on the levels of editorial control in the two statutes, Congress did not adopt a content immunity provision applicable to DBS operators that make channel capacity available under Section 335(b). The absence of this immunity provision indicates that DBS operators were not to be forced to accept any programming on their reserved channels. Since DBS operators may choose among qualified programmers, there is no need for a grant of immunity.

Thus, contrary to the arguments of some, there is nothing in the purpose, statutory language or legislative history of Section 335(b) to suggest that DBS operators are to be governed by the same editorial control restrictions that apply to cable television's leased access model. By its own terms, Section 335(b) is designed to ensure that the reserved DBS channels are used by certain identified types of programmers for certain specific types of programming. Accordingly, a DBS operator must make a determination that the programmer and programming on these channels fit the criteria of the statute, and so long as the DBS operator does not control the content of the programming, there is no statutory prohibition that prevents the operator from selecting among various programmers that meet the criteria.

2. Direct Costs

Some of the same parties that urge the Commission to read into Section 335(b) restrictions on editorial control which do not exist, also seek to have the Commission read out of the statute certain elements of "direct costs" that would properly be included in the rates charged for reserved DBS channels that a DBS operator might choose to make available on a leased basis. These parties ignore the widely accepted economic definition of direct costs, and the Commission's correct interpretation of the term, and rely on irrelevant legislative history to support their view that DBS operators may only receive reimbursement of 50% of the incremental cost of transmitting a signal to the satellite channel.

Webster's Third New International Dictionary defines direct cost as a "cost that may be computed and identified directly with a product, function or activity and that usually involves expenditures for raw materials and direct labor, and sometimes specific and identifiable items of overhead." In the context of Section 335(b), this definition would include both a DBS operator's incremental costs of transmitting programming plus a proportionate share of the directly attributable costs of constructing, launching and operating the DBS satellite.

The Commission has recognized that direct costs of services include an allocable share of the underlying cost of plant and equipment. In its recent Video Dialtone Services (Recon.) decision, 76 R.R. 2d 740 (1994), the Commission stated:

> Under our established practice, direct costs include the costs and cost components associated with the primary plant that

> is used to provide the service.[405] In the case of video dialtone, some of these plant costs will be incremental costs associated with plant dedicated to video dialtone service.
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> Moreover, we expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services.
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> 405/ Primary plant investment is investment recorded in central office equipment, information origination/termination equipment, and cable and wire facilities accounts. The cost components associated with these primary plant accounts include gross investments, depreciation reserves and expenses, various taxes and deferred taxes, return on investment, and plant-specific operations expenses. See generally Part 32 of the Commission's Rules. Id. at 785.

Thus, Commission treatment of direct costs is consistent with the standard definition of the term and the position advanced in this proceeding by the DBS operators.

To support a more restrictive definition of direct costs, some parties rely on language in the House Report that states that "[d]irect costs include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite, and shall not include any indirect costs such as marketing, administration, or other similar overhead costs." H. Rep. 102-628, 102d Cong., 1st Sess. at 136 (1992). But reliance on that Report language (which PRIMESTAR submits is ambiguous at best) ignores the fact that the statutory language that the House Report describes is significantly different from the final language of Section 335(b), and there is nothing in the Conference Report to suggest a miserly view of direct costs as some parties advocate.

The language of Section 18(a)(4) of the House Bill (H.R. 4850) that the above-quoted Report language describes is as follows: "The direct broadcast satellite service provider may recover only the direct costs of transmitting public service programming on the channels reserved under this subsection." Although it is far from clear that H.R. 4850's definition of direct costs would exclude the direct costs associated with satellite construction, launch and similar items, PRIMESTAR acknowledges that there is a colorable argument that the language limits the direct costs as some proponents wish. But the language in the House Bill, and in the House Report, is irrelevant because Section 335(b)(4) says something quite different:

> (B) the Commission shall not permit such prices to exceed, for any channel made available under this

> subsection, 50 percent of the total direct costs of making such channel available; and
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> (C) in the calculation of total direct costs, the Commission shall exclude --
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> (i) marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service; and
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> (ii) the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.

(Emphasis added.)

Clearly, "total direct costs of making such channel available" is more inclusive than the "direct costs of transmitting public service programming," and the specific exceptions in paragraph (C) of Section 335(b)(4) cannot be read to exclude from direct costs a proportionate share of the capital and operating costs of the DBS satellite. Moreover, the language of the Conference Report avoids the ambiguous phrase used in the House Report and essentially reiterates words used in Section 335(b):

> Prices to such national educational programming suppliers cannot exceed 50 percent of the total direct costs of making a channel available. Direct costs exclude marketing costs, general administrative costs and similar overhead as well as any costs associated with a lost opportunity for commercial profit.

Conf. Rep. No. 102-862, 102d Cong., 2nd Sess. at 100 (1992).

Based on the foregoing, the Commission was correct in its tentative conclusion that "total direct costs" include a proportionate share of the expense of construction, launch and operation of a DBS satellite. Neither the language of Section 335(b) nor its history in the Conference Report supports the exclusion of these costs from a DBS operator's calculations. Reliance on the House Report language to limit the definition of direct costs would be misplaced and contrary to the plain meaning of the term, the Commission's prior interpretation of it, the language of the statute and relevant statements in the Conference Report.

3. Lowest Unit Charge

Section 335(a) of the Act directs the Commission to adopt rules to apply the "use of facilities requirements of Section 315 to providers of direct broadcast satellite services." Section 315 requires broadcasters who permit political candidates to use

their facilities to afford "equal opportunities" to competing candidates and, during certain periods, to set candidates' advertising rates at the "lowest unit charge." The application of these concepts to DBS operators clearly anticipates that DBS operators are engaged in the sale of advertising time in a manner similar to television broadcasters. In fact, that is not the case. Although PRIMESTAR has the rights to sell advertising in certain of the networks it has licensed for distribution over the PRIMESTAR service, at the present time, PRIMESTAR is not selling any commercial time. PRIMESTAR believes that other DBS operators are in the same position. At such time as the DBS business matures, the DBS operators may find it in their best interests to establish advertising sales departments and affirmatively market to commercial advertisers. Until that occurs, PRIMESTAR submits that the Commission should defer the adoption of Section 315 rules in the DBS context.

In conclusion, PRIMESTAR submits that the purpose, language and legislative history of Section 335(b) evidences a clear Congressional intent not to apply the cable television leased access model to the educational and informational channel reservation requirements for DBS operators. Thus, so long as DBS operators exercise no editorial control over the content of programming on these channels, the statute does not restrict a DBS operator's ability to select among programmers or programming that fit the criteria set forth in Section 335(b). Moreover, the statute cannot be read to limit the total direct costs that may be charged in a lease situation to the incremental costs of transmitting the programming to the satellite. The fundamental definition of direct costs, the Commission's prior interpretation of the term, and the language of Section 335(b) and the Conference Report, all support the inclusion of a proportionate amount of satellite capital and operating costs in the calculation of direct costs. Finally, the Commission should defer adoption of political advertising rules for DBS until such time as DBS operators are offering time to commercial advertisers.

Respectfully submitted,

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cc: Rebecca Arbogast